STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE FAIRRIS,

Plaintiff-Appellant,

v

WILLIAM J. GARLINGTON,

Defendant-Appellee.

UNPUBLISHED
March 20, 2003

No. 235657
Kent Circuit Court
LC No. 98-02914-NM

Before: Schuette, P.J., and Sawyer and Wilder, JJ

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts and Procedural History

In November 1991, plaintiff retained defendant to represent her in a paternity action against Frank Burnett, the father of her child born in June 1991. Defendant filed a complaint for order of filiation and declaration of paternity on behalf of plaintiff on November 12, 1991. Thereafter, the trial court twice dismissed the case of *Fairris v Burnett* (lower court docket no. 91-74466-DP) for lack of progress. Following the second dismissal for lack of progress, defendant filed a motion to reinstate and to enter a filiation order. This malpractice action arises out of the order of reinstatement and filiation [hereinafter "the order"] entered by the circuit court in the underlying case on September 30, 1997. Plaintiff asserts that the trial court entered the order without her knowledge, acquiescence, approval, consent or authorization.

The order states in part, "commencing Monday, December 30, 1996, Defendant [Frank Burnett] shall pay to Plaintiff child support and child care . . ." Plaintiff asserts that this order bars her from receiving any child support from the child's date of birth in 1991 through December 30, 1996. She alleges that defendant waived her right to obtain retroactive child support without her approval and misrepresented to her that the date contained in the order could be changed.

Defendant testified in his deposition that he believed that the order could be modified. He stated that he did not discuss the contents of the order with plaintiff before he signed it and that he signed it in order to "get something going" so that plaintiff could start collecting some

money from the father of her child. He did discuss the contents of the order with plaintiff the day after he signed it.

In January 1998, plaintiff hired a new attorney. Plaintiff's new attorney requested copies of the motion and order of September 30, 1997. Defendant sent those documents to plaintiff's new attorney on January 9, 1998. Plaintiff filed her complaint commencing this lawsuit on March 20, 1998. The complaint asserted that the order precluded her from recovering child support and child care expenses before December 30, 1996.

In February 1999, nearly a year after plaintiff filed her original complaint in the present lawsuit, she filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). She asserted that the September 1997 order barred her from recovering any child support before December 30, 1996. The circuit court determined that an issue remained as to whether the September 1997 order could be modified. The court decided that the issue should be resolved in the underlying case of *Fairris v Burnett*, and stayed proceedings in the present case pending the outcome of motions and appeals in the underlying case.

In July 1999, plaintiff's present counsel filed a motion to amend the September 1997 judgment of reinstatement and filiation, or in the alternative, relief from judgment in the underlying case of *Fairris v Burnett*. After a November 24, 1999, hearing on the motion, Judge Patricia D. Gardner refused to grant the retroactive modification because plaintiff had waited too long to request the modification. Judge Gardner opined that MCR 2.612(C)(2), concerning relief from judgments and orders, required that plaintiff bring the motion to amend within one year of the entry of the original order (in this case by September 30, 1998). On October 3, 2000, this Court denied plaintiff's delayed application for leave to appeal for lack of merit in the grounds presented (docket no. 225896). Our Supreme Court subsequently denied plaintiff's application for leave to appeal.

On May 23, 2001, defendant filed a motion for summary disposition in the present case seeking dismissal of plaintiff's claims against him. He asserted that the September 1997 order was subject to modification on timely motion by plaintiff, but that the trial court denied plaintiff's motion to modify the order because she failed to file the motion within the one year time constraint of MCR 2.612(C)(2). Defendant argued that collateral estoppel precluded plaintiff from relitigation of the previously adjudicated denial of modification. Defendant argued that because plaintiff had the opportunity to obtain a modification of the September 1997 order, her malpractice claim should be barred. The trial court granted defendant's motion for summary disposition, stating:

> And since there's absolutely no basis here to conclude, not even a claim that this is the case that Mr. Garlington interfered with or in some fashion impaired the ability of subsequent counsel to act within a time limit, I have to conclude that one of two legal principles applies here. I'm not exactly sure which one it is, but I think that is because, under the circumstances in this case, they both combined to achieve the same result.
>
> Either the conduct of Mr. Garlington, assuming that it was improper, was not the cause of what happened here, or Ms. Fairris, through subsequent counsel,

failed to make a reasonable effort to mitigate her damages, either of which means that she cannot now pursue this matter.

I also believe that – and there's no case law to the contrary, so I'm entitled to so believe and so rule it is a matter of policy, litigants who claim they have suffered harm because of misconduct by counsel must, when there is an avenue of relief available to them, exercise that avenue of relief to see if in fact the harm can be undone.

If they do not do that, what in reality we have is a situation where, for all practical purposes, the harmed party has decided to submit to the harm and then look to someone else to compensate them for that. I don't believe that our Supreme Court will permit that type of conduct to succeed.

II. Standard of Review

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776.

III. Analysis

Plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition because contrary to the trial court's assertion, plaintiff could not have mitigated her damages. We disagree.

Plaintiff's first argument is that the order of reinstatement and filiation was not subject to retroactive modification based on MCL 552.603. This is an incorrect application of this statute to the present situation. At the time the trial court entered the order, the statute provided, in relevant part:

> Sec. 3. (1) A support order issued by a court of this state shall be enforced as provided in this section.
>
> (2) Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a domestic relations matter as defined in section 31 of the friend of the court act, being section 552.531 of the Michigan Complied Laws, is a judgment on and after the date each support payment is due, with the full force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification. Retroactive modification of a support payment due under a support is permissible with respect to any period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

This statute allows retroactive modification of a support payment due under a support order only with respect to periods of time in which there was a petition for modification pending.

We find that the statute does not apply to this situation because plaintiff is not seeking a change in the amount of support. Rather, plaintiff is seeking to have support established for a period of time not covered by the prior order.

In *Thompson v Merritt*, 192 Mich App 412, 422; 481 NW2d 735, 740 (1991)[1] this Court reviewed a similar situation. In *Thompson*, a paternity action, plaintiff gave birth to a child in December 1986. In January 1987, the defendant father agreed to pay support of $100 per week. The plaintiff brought a paternity suit in August 1987, and the lower court entered an interim order for child support of $200 per week. *Id.* at 415. The lower court eventually entered a judgment of filiation in April 1989, requiring defendant to pay support of $125 per week from the birth of the child to June 1989, and $113 per week thereafter. *Id*. Defendant and plaintiff appealed and defendant argued that the award of $125 per week constituted a retroactive modification of the parties' agreement setting support at $100 per week. *Id.* This Court disagreed because it concluded that no support order existed during the time defendant paid the $100 per week, so no retroactive modification had occurred. This Court stated:

> Regarding defendant's argument concerning retroactive modification, the statutory language of MCL § 722.717(2) provides for "the payment of the necessary expenses incurred ... for the support of the child prior to the making of the order of filiation." Here the trial court's support order was made effective on the date of Kaitlen's birth. This is not a retroactive modification of a support order as defendant suggests because there was no support order in existence during this period. This order simply provided for the payment of expenses incurred before the entry of judgment, a provision permitted by the statute. *Id.* at 422

Just as in *Thompson*, there was no filiation order in place in the present case and; therefore, retroactive modification could not occur and MCL 552.603 does not apply. Plaintiff could have accomplished her goal of obtaining child support for the period of time between the birth of her child and December 29, 1996, had she filed her motion to amend the order in a timely fashion.

To amend the order, plaintiff had to proceed under MCR 2.612(C). Under MCR 2.612(C)(1)(a) plaintiff could obtain relief from the order based upon mistake, inadvertence, surprise or excusable neglect. However, relief under this subrule has to be sought within one year after the order was entered pursuant to MCR 2.612(C)(2), a condition plaintiff did not satisfy. This subrule applies because plaintiff is arguing that she did not realize the content and/or the significance of the order when it was entered. Plaintiff emphasizes that she never gave her consent to the support provision, but it is clear based on defendant and plaintiff's

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[1] On October 29, 2002 this court entered an order pursuant to MCR 7.215(I) to convene a special panel to resolve a conflict between *Thompson v Merritt*, 192 Mich App 412, 481 NW2d 735 (1991)**.** and *Rose v Stokely*, 253 Mich App 236; 655 NW2d 770 (2002). The conflict between these two cases involved the issue of the constitutionality of the Paternity Act's confinement cost allocation provision and it does not affect the issue of retroactive modification in the present case.

acknowledgements that plaintiff knew what the provision said within a few days after the order was entered.

Plaintiff's argument that Judge Gardner denied her motion to amend the order because MCR 2.612(C) was not an appropriate form of relief is a mischaracterization of those proceedings. In fact, Judge Gardner stated:

> The Court has further reviewed a number of times MCR 2.612 and it seems to me that Ms. Fairris did not come in and say, a month later or two months later, you know, what's going on, there's a typo, or that wasn't what I agreed to, or that's not what I negotiated. She's just saying, well, I didn't read it or I wasn't fully informed or my attorney misrepresented my position. So, I think that the motion would have needed to be brought within a year of the date and that the stated relief is not appropriate to be granted. Therefore, the Court would deny the motion and the Order for Reinstatement and Filiation with the concluded dates will continue to apply.

Following a request from plaintiff's counsel for clarification of the grounds for the denial of the motion, Judge Gardner stated:

> So I – if she has an issue with Mr. Garlington, then she has an issue with his counsel, I suppose, unfortunately. *But, I don't find that her requested relief is timely.* [Emphasis added].

Thus, relief was potentially available to plaintiff based on MCR 2.612(C)(1)(a) and Judge Gardner properly determined that plaintiff's request for such relief was not timely as it was not brought within one year from the date of the September 30, 1997 order.

The trial court correctly determined that plaintiff had ample opportunity following her discovery of the problem with the order and her retention of another attorney in which to file a motion to amend the order pursuant to MCR 2.612(C)(1)(a). When a malpractice plaintiff has the opportunity to litigate with successor counsel retained before the expiration of the applicable period of limitation, she may not hold her prior attorney legally responsible for such damages as she allegedly sustained as a result of her failure to seek timely relief. *Estate of Mitchell v Dougherty*, 249 Mich App 668; 644 NW2d 391 (2002); *Boyle v Odette*, 168 Mich App 737; 425 NW2d 472 (1988).

In sum, MCL 552.603 did not preclude relief. Furthermore, MCR 2.612(C)(1)(a) would have provided plaintiff an avenue of relief had such relief been timely sought. Plaintiff may not now proceed in this lawsuit against her original attorney where she failed to utilize available remedies. Therefore, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder